IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33665

Joseph E. Baker, et al., Appellants
v.
Consolidated Rail Corporation and American Premier Underwriters, Inc., Appellees

and

Charles S. Adams, et al., Appellants
Herbert J. Adams, et al., Appellants
Jerry M. Abbott, et al., Appellants
Peggy Tackett, Administratrix of the Estate of Walk Tackett, Deceased, Appellant
v.
CSX Transportation, Inc., Appellee

and

Charles C. Albright, et al., Appellants
v.
Norfolk Southern Railway Company, Appellee

and

Paul D. Anthony, et al., Appellants
v.
Norfolk Southern Railway Company, Appellee

Appeal from the Circuit Court of Kanawha County, West Virginia
The Honorable Arthur M. Recht, Judge
Civil Action No. 02-C-9500

BRIEF OF APPELLEES, CONSOLIDATED RAIL CORPORATION, AMERICAN PREMIER UNDERWRITERS, INC. AND CSX TRANSPORTATION, INC.

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INTRODUCTION

Appellants are over a thousand railroad employees who alleged they were injured by exposure to hazardous substances while working for the Appellees (railroads). Appellants have stipulated that they are non-residents of West Virginia and that their alleged cause of action arose outside of West Virginia. Their mass Complaints were filed in various counties in West Virginia under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.* Appellees, Consolidated Rail Corporation, American Premier Underwriters, and CSX Transportation filed Motions to Dismiss based on the applicable venue statute, W.Va.Code, 56-1-1(c) [2003]. The Honorable Arthur M. Recht, noting that all the Appellants were admitted non-residents and that none of the acts giving rise to their cause of action occurred in West Virginia, applied W.Va.Code, 56-1-1(c) [2003] as it is written and dismissed Appellants' claims and consolidated them for purposes of this appeal. (R.173).

ARGUMENT

I. STANDARD OF REVIEW AND APPLICABLE LAW

A. Standard of Review

This Court employs a "de novo" standard of reviewing when dealing with a constitutional challenge relating to a statute. West Virginia ex rel. Citizens Action Group v. West Virginia Economic Development Grant Committee, 580 S.E.2d 869, 875-876 (W.Va.2003).[1]

Also, when this Court also is asked to consider the constitutionality of a statute (in this case, a venue statute), great deference is to be given the Legislature and all doubts resolved in favor of the plenary powers of the Legislature. Specifically, this Court stated in Randall v. Fairmont City Police Dept., 412 S.E.2d 737, 745-746 (W.Va.1991):

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. [*W.Va. Const.* art. V, § 1.]. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, **and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question.** Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt."
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> Randall, 412 S.E.2d at 745-746, *citing,* State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965).

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[1] The standard of review for a trial court's decision on a motion to dismiss for improper venue is for "abuse of discretion." *See* United Bank, Inc. v. Blosser, 218 W.Va. 378, 624 S.E.2d 815 (2005) (establishing an "abuse of discretion" standard of review for trial court's decision in regard to venue).[1] As such, when a circuit court is afforded "discretion" in making a decision, this Court "grants trial court judges wide latitude in conducting the business of their courts" and accords "great deference to the lower court's determination." Lipscomb v. Tucker County Com'n 527 S.E.2d 171, 174, (W.Va.1999) and Rollyson v. Jordan, 205 W.Va. 368, 518 S.E.2d 372, 380 (W.Va.1999).

B. Applicable Law

1. The West Virginia Venue Statute (W.V.Code § 56-1-1(c) [2003]

The trial court dismissed Appellant's cases based on W.V. Code § 56-1-1(c) [2003], which states:

> (c) Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: Provided, that unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.
>
> In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refiling in a court in any other state or jurisdiction."

Noting the parties' stipulation that none of the Appellants/Plaintiffs were residents of West Virginia, none of the Appellees/Defendants were residents of West Virginia, and none of the acts giving rise to their claims occurred in West Virginia, the trial court properly applied the statute as written and dismissed the Appellants' actions.

2. The Federal Employers Liability Act

a. State Venue Provisions Apply in FELA Actions Filed in State Court

Appellants' original actions were brought under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.*, a unique federal statute dealing with injuries to employees involved in inter-state transportation, specifically the railroad industry. The FELA has several distinct features, including a

limitation on where plaintiffs may bring their action, pursuant to the specific venue provisions in the FELA when filed in federal courts. (45 U.S.C. § 56). The FELA also permits plaintiffs to file their actions in state court; however, when they do so, they are **subject to that state's specific venue provisions** and further subject to dismissal if they fail to meet those state venue requirements. *See* Miles v. Illinois Central RR. Co, 315 U.S. 698, 703 (1942). Thus, Appellants are incorrect in asserting a federal entitlement to impose venue in "any [state court] jurisdiction in which the Defendant conducts business . . . ." *See* Brief of Appellants at p.5. To the contrary, venue determinations in FELA claims filed in state court are subject to that state's specific venue laws and not the "anywhere the defendant does business" test applicable when the action is brought in federal court. *See* Miles 315 U.S. at 703. ("The venue of state court suits [brought under the FELA] was left to the practice of the forum"). Despite suggesting the improper application of federal venue principles, Appellants ultimately concede nonetheless that the state statute (W.V. Code § 56-1-1(c) (2003)) was "properly applied" to their actions by the Trial Court. *See* Brief of Appellants at p.5.

b. The FELA's "liberal recovery" and "humanitarian purpose" standard does not apply when considering proper venue of an action.

Consistent with their general theme that the FELA is a sweeping "remedial" statute, the Appellants' claim without qualification that the FELA should "favor workers" and should be "construed in their favor" to affect its "humanitarian purpose." *See* Brief of Appellants at pp. 6-7. However, the several cases that they have cited deal specifically with issues regarding the determining of substantive liability against employers under the FELA. Nowhere in any caselaw is it held or suggested that the "liberal purpose" of the FELA demands that a state court change the application of its own venue statute to favor FELA plaintiffs in selecting an appropriate forum. It is noteworthy, however, that despite the Appellants' attempt to frame the FELA as a statute that should "favor" them, these Appellants in this matter were never denied a forum. They have always

had the "liberal" ability to file their FELA actions in the state of their own residency (pursuant to typical state venue statutes, such as West Virginia, which generally allow residents to file in their state of their residency) and/or the state where they claim their injury took place.

II. THE TRIAL COURT'S DISMISSAL OF THE APPELLANTS' FELA CLAIMS DID NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION.

A. The Holding of Morris v. Crown Equipment Corporation was Limited to Resident Defendants and does not Apply to the Current Non-Resident Appellants (Defendants).

This Court's recent decision in Morris v. Crown Equipment Corp., 633 S.E.2d 292 (W.Va.2006) is the "protagonist" in this appeal. While this Court is well-familiar with the facts of the Morris case, the Appellants' presentation of the case is simply inaccurate. Although the Court did engage in a full analysis under the "Privileges and Immunities Clause," (U.S. Const., Article IV, Sec. 2), it significantly recognized that when a statute can be "construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the court." Morris at 633 S.E.2d at 300, *citing* Peel Splint Coal Co. v. State, 36 W.Va. 802, 15 S.E. 1000, 1004 (1892). (A "narrow-breadth" reading of a statute to assure that its application is constitutionally proper is appropriate as a less-intrusive remedy.). Applying that "narrow-breath reading," this Court specifically and narrowly held that, "...under the Privileges and Immunities Clause of the *United States Constitution,* Art. IV, Sec. 2, the provisions of W.Va.Code, 56-1-1(c) [2003] do not apply to civil actions filed **against West Virginia citizens and residents**." (emphasis added). Contrary to the assertions of the Appellants, this Court did not invalidate W.Va.Code, 56-1-1(c) [2003] in its entirety. Instead, it specifically held that W.Va.Code, 56-1-1(c) [2003] cannot be used by a West Virginia resident to avoid suit in West Virginia.

While Appellants claim that the trial court's application of Morris to the non-resident defendants in the present matter was incorrect, it is important to note that had this Court wished to apply the restrictions of the Privileges and Immunities Clause to non-resident defendants as well as resident-defendants, it clearly had the opportunity to do so in Morris. Instead, this Court analyzed whether or not the non-resident defendant (Crown) could still be brought into the case by the "venue-giving" resident-defendant (Morris). Clearly, had this Court wished its Constitutional prohibition W.Va.Code, 56-1-1(c) [2003] to apply to non-resident defendants, it would not have engaged in the analysis regarding defendant Crown.

As it is undisputed that the Appellants in the matter are NOT West Virginia residents, the holding of Morris, as was recognized by the trial court, simply has no application to the matter at hand.

B. Application of W.Va.Code, 56-1-1(C) [2003] under Controlling FELA Caselaw does not Violate The Privileges and Immunities Clause

As is clearly evidenced in the caselaw, and as is further noted by Justice Maynard in his dissent in Morris, and Justice Benjamin in his concurrence, there is direct, controlling, case-law regarding venue in cases arising under the FELA which clearly show that statues similar to W.Va.Code, 56-1-1(c) [2003] do not violate the Privileges and Immunities Clause.

In Douglas v. New York, N.H. & H.R.Co, 279 U.S. 377 (1929), a railroad employee filed a FELA action in New York; however the Plaintiff was a resident and citizen of Connecticut and the Defendant railroad was a resident/citizen of Connecticut (place of incorporation) and only did business in New York. The action, filed in state court, was subject to New York State's venue requirements which did not allow the "non-resident" plaintiff to proceed with a case against the non-resident defendant. The U.S. Supreme Court upheld dismissal of the lawsuit holding that, based on the Privileges and Immunities Clause, New York was permitted to reject the filing of suits by non-residents, and thus "prefer" the suits of residents, so long as it equally did the same

regardless of the person's citizenship." Id at 386-387. Further, the Supreme Court also cited judicial economy concerns, stating that, "there are manifest reasons for preferring residents in access to often overcrowded Courts, and in the fact that broadly speaking it is they who pay for maintaining the Court concerned." Id.

Thirty years after Douglas, the Supreme Court addressed a similar issue in State of Missouri ex rel. Southern Ry. Co, v. Mayfield, 340 U.S. 1 (1950). In Mayfield the Court was again considering FELA cases strikingly similar to these cases. The Plaintiffs in Mayfield were non residents of Missouri who filed FELA actions in Missouri against non-residents of Missouri ("foreign corporation) for acts which occurred outside of Missouri. This case arrived at the Supreme Court with the question of whether a state court could bar actions, in this case under the doctrine of *forum non conveniens*, of non-residents of Missouri and allow similar actions of residents of Missouri. In holding that the Privileges and Immunities Clause did not bar such venue limitations imposed by the states, the Court held that "if a State chooses to [prefer[residents in access to often overcrowded Courts and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control." Mayfield, 340 U.S. at 3,4, *See also* Morris, 633 S.E.2d at 307. (*Justice Benjamin, concurring*).

Since the Court's decisions in Douglas and Mayfield, numerous state courts have also held that denying venue to nonresident FELA plaintiffs who are not citizens of the forum does not violate the Privileges and Immunities Clause, so long as venue is also denied to nonresident FELA plaintiffs who are also citizens of the forum. *See*, Johnson v. Chicago, B & Q. R. Co., 243 Minn. 58, 63 (1954). ("[s]ince the decision by the United States Supreme Court in Mayfield, there can no longer be any doubt that the states are left free to adopt or reject the doctrine of *forum non conveniens* as far as federal law is concerned as long as they treat citizens of their own state who are nonresidents on the same basis as they treat noncitizens who are nonresidents."); *see also*, Mobley v.

Southern Ry. Co., 418 A.2d 1044 (DC.App.1980); Southern Ry. Co. v. McCubbins, 196 So.2d 512 (Fla.App.1967); Wieser v. Missouri Pac. R.R. Co., 456 N.E.2d 98 (Ill.1983); Gonzales v. Atchison, Topeka & Santa Fe Ry. Co., 371 P.2d 193 (Kan.1962); Maynard v. Chicago & N.W. Ry. Co., 247 Minn. 228 (1956); and Norfolk and Western Railway Co. v. Tsapis, 184 W.Va. 231, 236 (1990) (*overruled on other grounds*) (allowing West Virginia Courts to deny venue to non-resident Plaintiffs under *forum non conveniens).* These decisions, along with the oft-cited case law of Douglas and Mayfield, clearly show that a state is permitted to allow suits only by it own residents, whether by statue or individual court ruling.[2]

In order to avoid the clear controlling caselaw, Appellants seek essentially to abandon or overrule these cases. In their zeal, Appellants, unfortunately, argue that Douglas and its progeny create a discriminating effect akin to the Supreme Court's notorious decision in Plessey v. Ferguson, 163 U.S. 537 (1896) (which authorized racial segregation until its fortunate abrogation by Brown v. Board of Education, 347 U.S. 483 (1954)). (*See* Appellants' Brief at 10). Regardless of the audacity of comparing Douglas to Plessey, the clear fact is that the principles in Douglas are clearly on-point and should not be abandoned.

The specific focus of Appellants' disagreement with these cases is that they are "old" and do not reflect the "modern day" approach to Privileges and Immunities Clause jurisprudence. In support, the Appellants cite to Toomer v. Witsell, 334 U.S. 385 (1948) and other cases that apply a more "modern analysis" to challenges brought pursuant to the Privileges and Immunities Clause. Appellants specifically argue that the resident/citizen distinction has been abrogated by the Supreme Court and that the issues in this case must be analyzed under a three-pronged "substantial relationship test." However, the issue of whether W.Va.Code 56-1-1(c) [2003] violates the Privileges

[2] In the present matter, it was an act of the Legislature (in W.Va.Code, 56-1-1(c) [2003]) in which this was applied in West Virginia, instead of being left to numerous and inefficient individual court rulings. This is critical as Appellants have conceded that individual courts are constitutionally permitted to apply the doctrine of *forum non conveniens* to their individual cases.

and Immunities Clause must be analyzed under the Court's decisions in Douglas and Mayfield because they are exactly on point (dismissal of FELA cases due to state venue) and have not been overruled. *See*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *see also*, Florida League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir.1996) (Courts may not "disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.").[3]

Moreover, it must be pointed out that Mayfield, which restated and upheld the holding in Douglas, was actually decided two (2) years after the "modern"' privileges and immunities analysis was adopted in Toomer. *See*, Owens Corning v. Carter, 997 S.W.2d 560 (Tex., 1999); *See also*, Delgado v. Reef Resort Limited, 364 F.3d 642 (5th Cir.2004) (Supreme Court's decision in Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) did not purport to change prior established Privileges and Immunities jurisprudence, rather, the Court in "Piper merely applied long existing law to unique facts that have little or no relationship to the case at bar.").

Applying the line of cases from Douglas and Mayfield establishes that W.Va.Code, 56-1-1(C) [2003] does not even remotely violate the Privileges and Immunities Clause. The Supreme Court has clearly given state legislatures the "control" and discretion to "prefer" West Virginia residents in actions, specifically FELA action (*See* Mayfield, *supra*), and Appellants cannot avoid this fact by simply requesting that this Court ignore these cases.

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[3] If this Court concludes that Morris applies to the instant case, it should overrule Morris to the extent it is inconsistent with Douglas and Mayfield and this Court's decision in Tsapis, in which this Court found that the Privileges and Immunities Clause is *no impediment* to the rejection of foreign litigation brought by nonresident plaintiffs. *See* Rodriguez de Quijas, *supra*.

C. Application of W.Va.Code, 56-1-1(C) [2003] Under The "Modern Standard" Does Not Violate The Privileges And Immunities Clause

Instead of applying the on-point analysis of the well-referenced FELA cases above, Appellants submit that their constitutional challenge should be decided under the "modern standard" as espoused by the Supreme Court in Toomer.[4] Curiously enough, even under the test proffered by Appellants, W.Va.Code, 56-1-1(C) [2003] would still **not** run afoul of the Privileges and Immunities Clause when it prevents a non-resident plaintiff from suing another non-resident in West Virginia's state courts.

Appellants claim there is a "three-prong" test for deciding if the application of W.Va.Code, 56-1-1(C) [2003] runs afoul of the Privileges and Immunities Clause; however, vernacular disputes aside, it has actually been termed a "two-step" analysis, by the Fourth Circuit in Parnell v. Supreme Court of Appeals of West Virginia, 110 F.3d 1077 (4th Cir.1997). Parnell stated:

> The United States Supreme Court has developed a two-step analysis for determining whether a residency-based restriction of an activity offends privileges and immunities protections. First, "the activity in question must be 'sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause.' " *Id.* at 64, 108 S.Ct. at 2264 (quoting *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden,* 465 U.S. 208, 216, 104 S.Ct. 1020, 1026-27, 79 L.Ed.2d 249 (1984)). In other words, a "fundamental right" must be implicated: the "out-of-state resident's interest [in the activity restricted] in another State [must be] sufficiently 'fundamental' to the promotion of interstate harmony so as to fall within the purview of the [Clause]." *United Bldg. & Constr. Trades Council,* 465 U.S. at 218, 104 S.Ct. at 1027-28 (quoting *Baldwin v. Montana Fish & Game Comm'n,* 436 U.S. 371, 388, 98 S.Ct. 1852, 1862-63, 56 L.Ed.2d 354 (1978)). Second, "if the

[4] Even before Toomer, in 1920, the Supreme Court proffered a form of a "balancing test" when it stated that, "constitutional requirements are satisfied if the nonresident is given access to the court of the State upon terms which are in themselves reasonable and adequate for the enforcing of any rights he may have, **even though they may not be technically and precisely the same in extent as those accorder to resident citizens.** Northern Ry. v. Eggen, 252 U.S. 553, 562, 40 S.Ct. 402, 404 (1920).

challenged restriction deprives nonresidents of a protected privilege," the restriction is invalidated only if it "is not closely related to the advancement of a substantial state interest." *Friedman,* 487 U.S. at 65, 108 S.Ct. at 2264 (citing *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 284, 105 S.Ct. 1272, 1278, 84 L.Ed.2d 205 (1985)). Parnell, 110 F.3d at 1080.

Further, the second step has also been explained as follows:

> The Clause does not preclude discrimination against nonresidents where: (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means. *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 284, 105 S.Ct. 1272, 1279, 84 L.Ed.2d 205 (1985) (citation and footnote omitted).
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> Parnell v. Supreme Court of Appeals of West Virginia, 926 F.Supp 570, 572-573 (N.D.W.Va.1996)

While Appellants frame their right as non-residents to "institute and maintain" actions in West Virginia as a "fundamental right," which automatically triggers a Privileges and Immunities analysis, there clearly is nothing in the Constitution which guarantees that non-residents have absolute access to the court of other states. Furthermore, there is no support for the proposition that FELA plaintiffs have the "fundamental right" to file their cases in any state of their choosing. To the contrary, it has firmly been established that state courts are not required to accept FELA cases. *See* Tsapis, 400 S.E.2d at 242 (*overruled on other grounds*), *citing* Douglas and Mayfield).

Even if such a right could be deemed to be "fundamental", a legislative plan restricting non-residents is not *per se* unconstitutional, as the statute is clearly related to a "substantial state interest": the overcrowding of West Virginia courts and their effect of depriving a forum to residents, as well as non-residents who are injured in the state, particularly when other jurisdictions can provide a legitimate forum.

1. **W.Va.Code, 56-1-1(C) [2003] Meets the "Substantial Reason Test" and the "Substantial Relationship" Test Suggested By Appellants.**

The Legislature clearly and unambiguously stated their reason for enacting W.Va.Code, 56-1-1(C) [2003]: "**The purpose of this bill is to preserve West Virginia courts for West Virginia citizens and for nonresidents injured in this state.**" 2003 W.V. S.B. 213 (*Note*) (emphasis added). In this simple statement, the Legislature has offered both the "substantial reason" and the "substantial relationship" required under the Privileges and Immunities Clause: The **Reason** - they want residents and those injured in the state to have to not deal with any sort of limited access to the court of West Virginia; and the **Relationship** – by only allowing residents and those injured in the state to file in West Virginia, it is assured that they have access to the courts of this state.

The inescapable logic of the actions of the Legislature force the Appellants to disregard the Legislature's findings and statement of purpose by arguing that West Virginia courts are **not** truly over-crowded with litigation from out-of-state plaintiffs. Indeed, two Justices of this Court expressly acknowledged this legislative finding:

> W.Va.Code 56-1-1(c) [2003] serves an important purpose. **Specifically, it is designed to give the residents of this State, who after all pay for our courts, ready access to them when needed. This can be effectively achieved only by preventing nonresidents from abusing our courts by flooding them with litigation, not because they do not have a forum elsewhere, but simply because they believe they may achieve a better result here.** For example, in the case of *Grimmett v. CSX Transportation, Inc.*, which was recently referred to the Mass Litigation Panel, approximately 71 out of 79 plaintiffs are nonresidents of West Virginia. In fact, these plaintiffs were involved in actions that were originally filed in Gwinnett County, Georgia. **These nonresident plaintiffs who may have very legitimate claims are nevertheless expending the time and limited resources**

of our State court system, to the detriment of resident plaintiffs, when their claims could have been brought elsewhere.[5]

Morris 633 S.E.2d at 304, *Justice Maynard, dissenting.* (emphasis added).

Ignoring the undisputed findings that the West Virginia courts **are** actually overcrowded with non-resident plaintiffs and that W.Va.Code 56-1-1(c) [2003] is a legitimate and reasonable way of addressing the situation, Appellants employ a tortured analysis of the language and intent of the statute in order to rebut the presumption that W.Va.Code 56-1-1(c) [2003] is constitutional. (*See* Randall 412 S.E.2d at 745-746). Appellants first attempt to limit the applicability of W.Va. Code 56-1-1(c) [2003] to only FELA claims, by making multiple presumptions based on the relative ease of plaintiffs to obtain jurisdiction over railroad defendants in states where they are not residents. However, after faulting the Legislature for arguably not fully defining its positioning or reasons, Appellants now commit the same violation, by failing to offer any facts, evidence, or logical reasoning as to how the Legislature intended, in practice or effect, W.Va.Code 56-1-1(c) [2003] to apply to a greater extent to FELA claims.

Appellants next look to Toomer for help in overcoming the presumption of constitutionality. Toomer, however, offers no support, and instead clearly demonstrates the reasonableness and logic of the Legislature's actions. In Toomer the statute there was designed, in effect, to preserve the "shrimp supply" of South Carolina's controlled water-ways. This "unique resource" of South Carolina (shrimp supply, in this case) was **not necessarily available in other states.** The way the South Carolina Legislature decided to preserve their shrimp supply was to limit the access of "non-residents" (by way of a higher license fee). *See* Toomer, 334 U.S. at 390, 391. South Carolina offered that it attempted to limit non-residents as a way of "preserving" their shrimp

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[5] Justice Benjamin also clearly acknowledged, "**Overcrowding of West Virginia courts caused by numerous suits filed by nonresidents against foreign corporations has long been a perceived problem in this State.**" Morris 633 S.E.2d at 307, *Justice Benjamin, concurring.* (emphasis added).

supply. Id. The Supreme Court found that while South Carolina may be allowed to attempt to preserve its shrimp supply, its effective limitation of "non-residents" (when it could have also limited residents) was not reasonably-related to the intended effect. Id at 398-399. Applying the facts in Toomer to the present case highlights the "reasonableness" of the Legislature's actions under W.Va.Code 56-1-1(c) [2003]. As opposed to the "shrimp supply" in Toomer, there is not one, unique resource in play here. Indeed, for the Appellants in question, there are well over fifty (50) resources in the form of state and federal courts where they could have filed their FELA claims, including the court in the state of their residency or the court in which their alleged claims actually accrued. There is certainly nothing unique about West Virginia's court system which would make the Legislature's decision to limit access to non-residents *per se* "unreasonable." Indeed, the Legislature clearly stated its reasons: It simply wanted to assure it residents the opportunity of convenience of filing suit in their home state, a perfectly reasonable and legitimate limitation or access to its courts.

Appellants finally suggest that W.Va.Code 56-1-1(c) [2003] is unreasonable because the Legislature could have employed less-severe methods of accomplishing its goals rather than "exclusion", such as "heightened filing fees" for non-residents, implying that the court needs to be "compensated" for the "extra burden" non-residents place on West Virginia courts.[6] This, however, does not actually accomplish the stated goal of assuring West Virginia residents have an (efficient) forum to file their claims. Because of this goal, exclusion was, in fact, the most reasonably-related method of accomplishing this goal; especially when the potential plaintiffs were not, in any sense of the word, "excluded" from filing their claims all-together. They simply had to go to the "trouble" of filing their claims in the state of their residency or where the tort occurred.

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[6] Appellant does not explain how a higher filing fee is any less discriminatory towards non-residents, particularly if the idea is to discourage non-residents from filing suit in West Virginia so as to preserve the courts for West Virginia residents.

Clearly, the Legislature is permitted to prefer West Virginia residents (and those whose claims accrued in West Virginia) as long as their measure is based on a substantial reason and is substantially related to those goals. W.Va.Code 56-1-1(c) [2003] meets these two requirements with ease. West Virginia court are overcrowded with non-resident plaintiffs and only allowing resident plaintiffs (and those whose claims accrued in West Virginia) to file in West Virginia is the most logical and reasonable way to accomplish this permitted goal.

III. THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S FELA CLAIMS DID NOT VIOLATE THE "RIGHT TO OPEN COURTS" PROVISION OF THE WEST VIRGINIA CONSTITUTION

Perhaps realizing the weakness in their arguments regarding the Privileges and Immunities Clause, the Appellants next attempt to overcome W.Va. Code 56-1-1(c) [2003]'s "presumption of constitutionality" by citing to two portions of the West Virginia Constitution, beginning with Article III, section 17, or the "open courts" provision. Curiously, Appellants' argument regarding this "open courts" provision asks this Court to revert back to the distinctions between "residency" and "citizenship" that they just previously asked this Court to abandon in their attempts to convince this Court to disregard FELA jurisprudence on venue and the Privileges and Immunities Clause (i.e. Douglas and Mayfield – holding a state may restrict FELA actions of non-resident non-citizens as long as it also restricts the actions of non-resident citizens). Specifically, Appellants attempt to claim that W.Va.Code 56-1-1(c) [2003] violates the "open courts" provision because it could deny a "non-resident citizen" access to the courts, even though this is exactly what was permitted by Douglas and Mayfield (providing that the court did not distinguish on "citizenship" and also deny forum to non-resident, non-citizens).

Appellants' inconsistent arguments aside, there is a fundamental flaw in their understanding of the "open courts" provision when they claim that the inaction of W.Va.Code 56-1-1(c) [2003]

would "close the door on a Plaintiff who would have otherwise been permitted access to this State's courts." Nowhere has this Court stated, and Appellants **cite no case law**, supporting the proposition that the "open courts" provision states that there can be **no** restrictions on who can file suits in the courts of West Virginia. To the contrary, and specifically, under the FELA, **state courts are not required to accept FELA cases** (as opposed to Federal courts which are required to accept FELA cases). *See* Tsapis, 400 S.E.2d at 242 (*overruled on other grounds*), *citing* Douglas and Mayfield). Even further, this Court in Tsapis has stated that a (FELA) plaintiff can be denied a forum, under the principles of *forum non conveniens*. Id at 233-234. Simply put, this Court has never held that the "open courts" provision is a bar to the Legislature proscribing standards on issues which can affect the right to file a case in West Virginia, such as venue. Indeed, under Appellants' argument, any statute which proscribed rules for venue, even the current incarnation of W.Va.Code 56-1-1[2003], would violate the "open courts" provision.

Appellants also attempt to invoke the "certain remedy" language of Article III, section 17, by claiming that W.Va.Code 56-1-1(c) [2003] does not pass a "reasonableness" test as stated in Robinson v. Charleston Area Medical Center, Inc. 414 S.E.2d 877 (W.Va.1991). Robinson, however, actually states, in no uncertain terms, the Legislature is to be given **great deference** when it stated:

> We stressed in Lewis that the "certain remedy" provision itself states that the "remedy" constitutionally guaranteed "for an injury done" to protected interests is qualified by the words, "by due course of law[,]" **thereby extending considerable latitude to the legislature.** In addition, we recognized that the general authority of the legislature to alter or repeal the common law is expressly conferred by article VIII, section 13 of the *Constitution of West Virginia*. Lewis, 185 W.Va. at 694, 408 S.E.2d at 644....This Court in Lewis observed that the economic basis underlying a tort action for damages indicates **that the right to bring such an action is not a fundamental right in the sense that any limitation on that right requires strict**

scrutiny under the "certain remedy" provision. Instead, the legislature may reasonably consider clear economic or social conditions in this state in deciding to alter or repeal the common law.

Robinson, 414 S.E.2d at 884; (emphasis added) (citation omitted).

Again, Appellants have offered nothing in the way of a cognizable argument as to how the Legislature ran afoul of the "certain remedy" provision in prohibiting non-residents from bringing actions against non-residents in West Virginia courts. Thus, whether it is by *forum non conveniens*, by other judicial method, or by legislative act (such as W.Va.Code 56-1-1(c) [2003]), it is clear that neither the "open courts" provision, nor the "certain remedy" provision are not, nor were they ever intended to be, bars to prevent Courts and/or the Legislature from setting rules and/or restrictions regarding the filing of suits in the courts of West Virginia.

Finally, when considering this purported "constitutional quagmire", some perspective is again necessary here. Appellants are not being denied, nor have they ever been denied, the right to pursue their FELA actions in an appropriate forum. They always have the right to pursue their case in the state of their residency and/or citizenship whether in state or federal court. Further, if they are insistent in trying their cases in West Virginia, the federal courts of this state are readily available to them.

IV. THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S FELA CLAIMS DID NOT VIOLATE THE SEPARATION OF POWERS CLAUSE OF THE WEST VIRGINIA CONSTITUTION

Appellants' final argument is their contention that W.Va.Code 56-1-1(c) [2003] violates the Separation of Powers Clause of the West Virginia Constitution. Appellants initially concede, as they must, that the Legislature is free to pass legislation dealing with the issues of venue (See Appellants' Brief at 23); however, Appellants request that this Court take the extraordinary step of invalidating

W.Va.Code 56-1-1(c) [2003] based on the fact that it prohibits non-resident plaintiffs from "joining" resident plaintiffs into their action.[7]

While not directly acknowledged by the Appellants, W.Va.Code 56-1-1(c) [2003] does create a rather unique situation of having a "venue giving plaintiff" rule, as West Virginia's previous (and current) venue statute was based on the residency of the defendant (or the place where the action accrued).[8] Appellants, however, do not demonstrate how such a venue-giving plaintiff rule is in violation of the Separation of Powers Clause. Instead, Appellants ignore the rule of law which states that only a **conflict** with the Rules established by this Court would invalidate a statute. Louk v. Cormier, 622 S.E.2d 788, 795 (W.Va.2005), ("a statute governing procedural matters in civil or criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court's rule-making powers.") By requiring a **conflict** before striking legislation pursuant to the Separation of Powers Clause, this Court gave necessary deference to the legislature:

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional

[7] It should also be noted that this Court, in Morris, in reviewing the constitutionally of W.Va.Code 56-1-1(c) [2003], did not address nor made any reference to how the statute creates a conflict between the legislative and judicial branches, despite having amply opportunity to do the same.

[8] This Court has already addressed the issue of "venue giving defendants" in the previous venue statute and held in State ex rel. Sutton v. Spillers, 382 S.E.2d 570, 571 (W.Va.1989) that: We modify our rule in Lester v. Rose, 147 W.Va. 575, 130 S.E.2d 80 (1963), to provide that, notwithstanding the dismissal of the venue giving defendant in an action involving multiple defendants from different counties, the circuit court has the discretion to retain jurisdiction of the action when the venue was initially proper and the plaintiff had a reasonable belief that he had a bona fide cause of action against the venue giving defendant, if the dismissal would result in substantial delay; AND If the circuit court finds that the joinder of the venue giving defendant was frivolous or fraudulent, done with the intention of depriving the remaining non-resident defendant of his right to be sued in his own county, or to obtain a specific forum, then the action shall be transferred by the circuit court according to our rule in Lester v. Rose, 147 W.Va. 575, 130 S.E.2d 80 (1963).

limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt. Louk 622 S.E.2d at 793 (internal citations omitted).

Despite Petitioners' attempts to couch W.Va.Code 56-1-1(c) [2003] as a "conflict" with the Rules of Civil Procedure, **they do not allege any actual conflict** other than offering a bland commentary that W.Va.Code 56-1-1(c) [2003] is an "encroachment" on rules of joinder. To the contrary, and as an example, the Rule regarding compulsory joinder allows for the applicable venue statute to be applied. W.Va. Rules Civ. Proc. Rule 19 clearly states that "If the joined party objects to venue and the joinder of that party would render the venue of that action improper, that party shall be dismissed from the action." Rule 19 clearly allows for a prohibition of joinder if the applicable venue rules are not met. This Rule is in harmony with W.Va.Code 56-1-1(c) [2003], as opposed to the "conflict" Appellants wish this Court to see.

In this vein, Appellants' argument on "joinder" is wholly irrelevant and inapplicable to the present appellants as, despite their statement to the contrary, they have not actually invoked the rules regarding joinder. There is nothing in Appellants' complaint to indicate they are invoking the rules of joinder, and attempting to do so would be impossible as these Appellants' actions clearly do not arise "out of the same transaction [or] occurrence," as these appellants all worked at different locations throughout the country and each had different work-related experiences. (R. 1, R.53) (*See.* W.Va. Rules Civ. Proc. Rule 20).[9] Simply because plaintiffs are permitted to file their action in one mass complaint does not mean there has been a permissive joinder under Rule 20. Indeed, if the Appellants had attempted to join their actions, Appellees would have opposed the same, as the claims result from specific and individually separate "transactions or occurrences."

[9] It must be pointed out that the Appellants' only goal in espousing this point on joinder is to defeat the exact purpose of the statute, as they have admitted that they "joined" a resident-plaintiff in an attempt to circumvent the statute and allow hundreds of non-resident plaintiffs to proceed on the coat-tails of that one "joined" resident plaintiff.

It is clear that the Legislature was able to anticipate these mass-plaintiff filings and their attempts to circumvent the statute. As W.Va.Code 56-1-1(c) [2003] was drafted in harmony with the Rules of Civil Procedure, it does not violate the Separation of Powers Doctrine, and thus does not serve as a basis for invalidating W.Va.Code 56-1-1(c) [2003].

V. CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the decision of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Brief of Appellees, Consolidated Rail Corporation, American Premier Underwriters, Inc. and CSX Transportation, Inc.** was served this 31st day of January, 2008 by U.S. Mail, postage prepaid upon the following:

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